**FINANCIAL INSTITUTIONS COMMITTEE MEETING**
**Business Law Section, State Bar of California**

Meeting of March 14, 2006

**Committee Members Present:** John Hancock, Chair; Meg Troughton, Vice Chair; Rosie Oda, Secretary; Michael Abraham; Bruce Belton; Laura Dorman; Andrew Druch; Jay Gould; Ken Krown; and Bob Stumpf .

**Advisory Members and Others Present:** Sally Brown; Clay Coon; Dr. Marsha Courchane; John Drews; Mary Kenney; Bob Mulford; Teryl Murabayashi; Michael Occhiolini; Jim Rockett; Rick Rothman; Neil Rubenstein; Kenneth Scott; Steven Takizawa; Gerry Tsai; Prof. Jim Wilcox; Maureen Young.

**Call to Order:** Our Chair John Hancock of World Savings called the meeting to order at 9:35 A.M.

**Welcome to Members and Advisory Members:** John welcomed the Committee Members and the Advisory Members and asked each person to identify themselves.

**1. Approval of February 14, 2006 Minutes:** The Committee approved the minutes of the February 14, 2006 Legislative Day meeting.

**2. *National Federation of the Blind v. Target Corporation*:** John discussed this complaint filed on February 7, 2006, in Alameda, alleging violation of the state version of the Americans with Disabilities Act ("ADA") - the federal act is not itself mentioned in the complaint - by denying blind California customers equal access to Target's goods and services through its website. John explained that there is a 9th Circuit case to the effect that the ADA does not apply to services that are not offered in a "place". For example, cable television services are not capable of public accommodation because they do not occur in a "place". Technological solutions are available for accommodating blind customers. Screen reader software can be used to vocalize text. Target's website was using image maps that could not be read. Retrofitting websites would be very costly to state businesses, including banks. The point is that the law on websites and availability to persons with disabilities is obscure. John commented that the state law may have been cited in order to keep the case in front of an Alameda county jury.

**3. Proposition 65 Notices Related to Secondary Smoke at ATM Sites:** Rick Rothman of Bingham McCutcheon discussed notices that have been received by about 40 banks from Consumer Defense Group ("CDG"), which is represented by Orange County attorney Anthony Graham. The CDG alleges violations based on the lack of warnings at ATMs about possible exposure to cigarette smoke, which is one of the hazardous chemical substances identified in Prop 65 as requiring a warning sign about risk of exposure to cancer causing chemicals. CDG apparently has been following the notice with an offer to settle for about $25,000 but does not actually file a complaint. This allows the CDG to operate under the radar, without having to file for Attorney General

review and approval as required by Prop 65. Some defense attorneys have formed a Joint Defense Group ("JDG") and have contacted the AG's office to see what can be done.

There was much discussion by the group about these notices. Meg Troughton of BofA asked who the CDG's clients were. Rick says that they are a group of unidentified concerned citizens. Michael Abraham of Bartko Zankel noted that a certificate of merit has to be filed which would have to provide specific examples, and that one of the ideas behind Prop 65 was to limit the number of lawsuits. Rick responded that the certificate of merit can't actually be challenged until after the litigation is over, and that CDG tries to leverage a limited notice into a broad-based, statewide settlement. He believes, however, that settlement with CDG cannot guarantee that other actions could not be filed elsewhere by other groups, or even by CDG itself. Rosie Oda of Pillsbury asked if the FIC could help with a legislative fix, and Rick responded that the statute itself has built-in protection requiring that Prop 65 can only be modified with a minimum 2/3 vote, and thus, a new initiative would be the only solution, which everyone agreed would not be feasible. Rick also explained that the AG can take over the case, make a finding about the certificate of merit, write a letter to Graham to let him know that the AG believes the case is without merit, or write an opinion. In response to Rosie's next question as to whether the AG could take action as he did in the case of the Trevor Law Group, John Hancock pointed out that there was a clear political advantage to taking on the Trevor Law Group which had tried to obtain settlements from tens of thousands of small businesses, which is absent here where the victim is a bank.

Neil Rubenstein of Buchalter asked whether remediating harm by posting notices would be deemed an admission that harm had previously occurred. Rick replied that liability would have already attached based on prior events, but that this issue had not been litigated to his knowledge. Bruce Belton of Tri Counties Bank asked whether it would be good enough to post a notice if no letter had been received yet. Rick replied that there may be other types of liability that a bank could not anticipate would require a notice and could not control, and thus, the problem is not resolved by posting a notice or telling customers not to smoke at the ATM. This was followed by a discussion of other possible areas of liability, such as diesel exhaust, nearby industrial activity, etc.

**4. *Wachovia Bank v Schmidt*, 546 U.S. ___ (2006):** Rosie Oda summarized this recent Supreme Court opinion holding that national banks were citizens of the state where their main office was located, and not citizens of any state where they had a branch, ATM or other physical presence. She explained that although the press has reported this as a venue case, the Supreme Court described it as a subject matter (diversity) jurisdiction case and not a venue case. The Supreme Court mentioned at the outset the inequity that could result if national banks had less access to federal court than state banks (which are located where incorporated) with interstate branches. Rosie pointed out that this case serves as a reminder that federal courts also have subject matter jurisdiction for any question arising under federal law, at 28 U.S.C. § 1331, and that it may be possible to characterize an issue as involving federal law under the National Bank Act rather than trying to meet diversity jurisdiction criteria under 28 U.S.C. § 1332.

**5. Wescom Credit Union Purchase of an Industrial Bank:** Rosie also discussed the recent announcement by Wescom, a state chartered credit union, that it intended to purchase a California industrial bank. Industrial banks are treated as banks in this state, except that they cannot offer demand deposits, only NOW accounts to consumers (and not commercial NOW accounts). She discussed the WalMart inspired legislation that permits a credit union to purchase an industrial bank at Fin. Code section 701.1, and the credit union service organization provision at Cal. Fin. Code section 14651(b) that permits a CUSO to offer services to credit unions but does not require that they do so exclusively. The controversy over WalMart's latest application to acquire an industrial bank in Utah is also a factor here. Rosie also provided some background on the cultural differences between banks and credit unions which somewhat explains Wescom's stated purpose for buying the industrial bank, *i.e.*, so that it can buy credit union credit card portfolios so that credit unions aren't forced to sell these portfolios to a bank. She described the other potential benefits to Wescom if the application is approved and not limited: expanded field of membership, access to the capital markets, and the ability to offer more commercial banking services than the credit union itself can.

Rosie also discussed the application of the Credit Union National Association, a credit union trade association, for a *de novo* industrial bank charter in Utah, and precedents for credit unions owning a trust company in California and a bankers' bank in Texas. Jim Rockett of Bingham discussed the perceived threat to community bankers and the unfairness of the exemption of credit unions from taxation when some credit unions have assets in the billions and operate like banks. John Drews, General Counsel of the Department of Financial Institutions and former consultant to California's Senate Banking Committee, noted that section 701.1 was the result of an alliance between community banks and credit unions to defeat WalMart. He also stated that Wescom has not yet filed an application at DFI and encouraged members to submit comments to DFI when it is filed.

**6. A Market Analysis of the 2004 Home Mortgage Disclosure Act ("HMDA") Data:** Dr. James Wilcox, Professor at the Haas Business School, and Dr. Marsha Courchane, Principal, ERS Group, Washington, D.C. presented their analysis of the 2004 HMDA data that was released last September. Their powerpoint presentation illustrated that there were a lot of ways to "slice the data" and different levels of potential review. Their slides illustrated the differences in publicly disclosed data on higher cost loans (only data concerning loans more than 3 points above comparable Treasuries is available) for minorities as compared to whites. For example, slide 6 showed that African Americans had more than 3 times the probability of receiving higher priced loans than whites. While this is somewhat consistent with the original HMDA accept/reject rates, it is troubling. Prof. Wilcox noted that the numbers re going to look much more dramatic next year because of the current interest rate anomaly where long term rates are about the same as short term rates. Also, APRs on adjustable rate loans have gone up higher than for fixed rate loans.

In reviewing prime versus subprime lenders, he noted more access even if at higher rates was being offered by subprime lenders, which also indicates the existence of greater

opportunity for African Americans. Prof. Wilcox had some interesting comments on whether taking into account down payment data, FICO score data or debt-to-income ratios would eliminate disparities. He also questioned whether there was a business necessity that could justify using factors resulting in a risk premium charge. Maureen Young of Bingham pointed out that most institutions do a second review and asked what else could be done. Dr. Courchane suggested monitoring broker by broker, particularly broker fees and yield spread premiums. She also suggested monitoring internal loan compensation, reviewing specific loan officers, and reviewing specific business costs to see whether pricing for the various loan amounts covers operating costs.